APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * *

(5) To refuse to bargain collectively with the representatives of his employees, * * *.

SEC. 10. * * *

(c) * * * If * * * the Board shall be of the opinion that any person * * * has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. * * *

* * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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No. 756

In the Supreme Court of the United States

OCTOBER TERM, 1943

AMERICAN CREOSOTING COMPANY, INCORPORATED,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 607)[1] is reported in 139 F. (2d) 193. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 84–111) are reported in 46 N. L. R. B. 240.

JURISDICTION

The decree of the court below (R. 606) was entered on December 4, 1943. The petition for a

[1] The designation "R" refers to the printed record filed in the court below, as supplemented by the opinion and decree of the court below.

writ of certiorari was filed on March 3, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (c) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the findings of the Board, which were sustained by the court below, that petitioner, by interrogating employees regarding union affiliation, by threatening loss of employment as the penalty for union membership, by discharging an employee because of his union membership, by refusing to bargain with the union[2] which represented a majority of its employees in an appropriate unit, thus causing and prolonging a strike of its employees, and by discriminatorily refusing reinstatement to 40 of the strikers, has committed unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act.

2. Whether the Board's delay in issuing a complaint herein, after charges were filed against petitioner, should shorten the period within which back pay is to be computed for the employees ordered reinstated.

---

[2] Oil Workers International Union, Local 379, affiliated with what was then the Committee for Industrial Organization and is now the Congress of Industrial Organizations.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 12–13.

STATEMENT

Upon the usual proceedings, the Board on December 23, 1942, issued its findings of fact, conclusions of law, and order (R. 84–111). The pertinent facts, as found by the Board, and shown by the evidence, may be summarized as follows:[3]

The Union was formed at petitioner's plant on December 4, 1936 (R. 87; 131, 245). The next day, Plant Superintendent Brown (R. 87; 118), characterizing the Union as "not a fit union to belong to," sought to persuade employee Keuhne, one of its founders, to abandon the organization and to influence fellow employees to do likewise (R. 87; 314–315). Brown also inquired of employee Ealey whether he had joined the Union, denounced the Union to him, tried to influence him to "drop out" of it and to "talk to the men and try to pull them out," and reinforced these remarks with the threat that petitioner would shut down its plant before it would sign a contract with any union (R. 87; 298–299). Other supervisory employees engaged in similar coercive conduct, questioning subordinates as to their union

[3] In the following statement, the references preceding the semicolon are to the Board's findings; the succeeding references are to the supporting evidence.

affiliation and interests, and threatening that such affiliation would lead to loss of employment (R. 87–90; 201–202, 220–222, 232–233, 235, 243–244, 283, 289–291, 292, 294–295, 299–300, 375–376, 379–380, 467, 482).

Upon questioning employee Frank McKenzie and thus ascertaining that he "seemed to be the strongest for the Union," petitioner, on December 15, 1936, instructed McKenzie's immediate superior to "get rid of" him. Pursuant to these instructions, McKenzie was discharged on the same day. (R. 87–88; 220–222, 232–233, 235–238.)

The Board concluded that petitioner discriminated in regard to the hire and tenure of employment of Frank McKenzie, thereby discouraging membership in the Union in violation of Section 8 (3) of the Act, and by the foregoing inquiries and statements interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 90, 108).

By March 19, 1937, the Union, which concededly represented a majority of petitioner's employees in an appropriate unit (R. 91; 341), had arrived at an understanding with petitioner as to terms and conditions of employment. However, petitioner refused to incorporate this understanding in a signed, written document. (R. 92; 132–134, 147, 259, 454, 594–596.) Petitioner prevailed, and the parties operated under the oral agreement until September 1937 (R 92; 148, 151, 259, 595). While this agreement was in effect,

petitioner continued its efforts to undermine the Union by telling employees that it would never recognize it, by urging employees not to become or remain members of the Union, and by threatening them with loss of employment for union membership or activity (R. 93; 289–291, 201–203, 294–295, 292, 299–300).

In September 1937, the Union sought a revision of terms and a signed contract (R. 93; 152, 269–270, 135–136). Faced with petitioner's unyielding insistence on the terms of the previous oral agreement, the Union finally offered to accept these terms if reduced to a signed, written contract (R. 93–94; 135–136, 161–162, 183–184, 200, 258–259, 338–339, 346–345, 366, 456–458). Petitioner, however, refused to sign a written contract (R. 94; 136, 182–183, 260, 339–340). Finally, on October 4, 1937, petitioner's employees struck in an effort to compel petitioner to enter into a written contract with the Union (R. 94; 126, 137, 166, 258–268, 265, 271, 309, 340). During the strike, the parties held several meetings in an effort to settle the controversy. Petitioner still made no counterproposal apart from reiterating its willingness to perpetuate the oral agreement of March 1937. In answer to the Union's demand that this agreement be signed, petitioner answered, "If you think this company will put their name on paper, either for this union or any other union * * * you are badly mistaken". (R. 94–95; 139–140, 200, 215, 243–244, 339, 458–459.)

On December 13, 1937, petitioner reopened its plant for operation, replacing the striking employees with others (R. 100; 142, 180–181, 184, 217, 377). The strike proving unsuccessful, the employees abandoned it on December 23, and on that date about 85 of the strikers appeared at the plant and requested reinstatement (R. 100; 141–142, 191–192, 324–325). Reinstating only 13 of the applicants, petitioner has since refused to displace those hired during the strike, and throughout has failed to reemploy 40 of the strikers, though it has recruited new employees while the 40 strikers awaited reinstatement (R. 101–102; 141–142, 192, 174–175, 264–265, 328, 378, 494, 565–566, 301, 325, 286–287, 283–285, 577–581, 591, 603–604, 543–546). In refusing reinstatement to some of the strikers who subsequently renewed their applications for employment, petitioner indicated that its refusal was actuated by the desire to punish them for their activities on behalf of the Union (R. 102–103; 283–284, 285, 328, 336, 286–287).

The Board concluded that petitioner failed in its duty to bargain with the Union in good faith as the exclusive representative of its production employees, and to embody any understanding reached in a written agreement signed by both parties, and that petitioner, on and at all times after March 19, 1937, by so refusing to bargain collectively with the Union, interfered with, restrained, and coerced its employees in the exercise

of the rights guaranteed in Section 7 of the Act (R. 95–96). The Board further concluded that the strike of October 4, 1937, was caused by petitioner's refusal to bargain as aforesaid, and was thereafter prolonged by petitioner's continued refusal to bargain (R. 99); that petitioner's refusal to reinstate the strikers constituted a discharge for engaging in concerted activity on behalf of the Union; and that on and after December 23, 1937, by its refusal to reinstate the strikers, petitioner has discriminated against such employees in regard to hire and tenure of employment, thereby discouraging membership in the Union and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 103).

Upon findings that petitioner's conduct as above summarized constituted unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act (R. 108), the Board ordered petitioner to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act; upon request, to bargain collectively with the Union, and if agreement is reached as to terms of employment, to embody such agreement in a signed, written contract; to offer the 41 employees discriminated against, reinstatement with back pay; and to post appropriate notices (R. 108–111).

On April 22, 1943, the Board filed in the court below its petition for enforcement of its order against petitioner (R. 1–5). On December 4, 1943, the court handed down its opinion (R. 607–613), and on the same date entered its decree (R. 606) sustaining the findings of the Board as to the unfair labor practices, and enforcing the Board's order with a modification not relevant here (R. 110, 610–612).

ARGUMENT

1. Petitioner's contention (Pet. 10–12) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp. 3–6) affords full support for the challenged findings, as the court below held (R. 608–610).

2. Equally unsound is petitioner's position (Pet. 4–10) that the Board's delay in issuing the complaint should toll the back-pay period. It is well settled that administrative delay does not operate to deny to the Board the right to proceed to the full effectuation of its orders, nor to deprive employees of the remedy to which they are entitled by reason of unfair labor practices committed against them by their employer. This rule is based on two main grounds: (1) that the Act has not conferred jurisdiction on the courts to determine whether the Board has acted with adequate promptness in disposing of the business be-

fore it, the same flexibility being allowed to an administrative agency as to courts of record, since "the same factors of crowded dockets and inadequate personnel may result in the unfortunate delays of which litigants often justly complain" (*National Labor Relations Board* v. *Wilson Line, Inc.*, 122 F. (2) 809, 815 (C. C. A. 3)); (2) that between an offending employer and the victims of his unfair labor practices, the consequences of administrative delay should be borne by the former (*National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 697–698 [4]).

Petitioner attempts to distinguish (Pet. 5–6, 10) between delay before and after the issuance of a complaint, asserting (Pet. 5–6) that the delay in the issuance of the complaint resulted in

[4] To the same effect are *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 597 (C. C. A. 9); *National Labor Relations Board* v. *Polson Logging Co.*, 136 F. (2d) 314 (C. C. A. 9) (*sub silentio*); *National Labor Relations Board* v. *Wm. Davies Co.*, 135 F. (2d) 179, 183–184 (C. C. A. 7), No. 319, present Term, certiorari denied, October 18, 1943; *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. (2d) 633, 636 (C. C. A. 2); *Berkshire Knitting Mills* v. *National Labor Relations Board*, 121 F. (2d) 235, 237 (C. C. A. 3); *National Labor Relations Board* v. *Bachelder*, 120 F. (2d) 574, 579 (C. C. A. 7), certiorari denied, 314 U. S. 647; *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. (2d) 903, 915 (C. C. A. 8); *Triplex Screw Co.* v. *National Labor Relations Board*, 117 F. (2d) 858, 862 (C. C. A. 6); *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. (2d) 202, 206 (C. C. A. 2), affirmed, 313 U. S. 177, 200; *National Labor Relations Board* v. *Kentucky Fire Brick Co.*, 99 F. (2d) 89 (C. C. A. 6) (*sub silentio*).

its inability to "know during that time whether the Board considered the case of sufficient merit to justify a complaint and hearing, * * *." This, we submit, is not a distinction in the applicable principle. As this Court has declared in answer to a similar contention, "Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee." *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583. Moreover, the courts have been as consistent in refusing to shorten the back-pay period due to delay in the issuance of a complaint, as they have been in cases involving other types of administrative delay. "The matter of time with regard to the issuance of a complaint by an administrative body must necessarily be one of the matters within the discretion of that body." *Berkshire Knitting Mills* v. *National Labor Relations Board*, 121 F. (2d) 235, 237 (C. C. A. 3); see also *National Labor Relations Board* v. *Polson Logging Co.*, 136 F. (2d) 314 (C. C. A. 9); *National Labor Relations Board* v. *Wm. Davies Co.*, 135 F. (2d) 179, 183–184 (C. C. A. 7), No. 319, present Term, certiorari denied, October 18, 1943; *National Labor Relations Board* v. *Wilson Line, Inc.*, 122 F. (2d) 809, 815 (C. C. A. 3).

CONCLUSION

The decision below, sustaining the Board's order as amended, is correct, and presents no

conflict of decisions or question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
ISADORE GREENBERG,
Attorneys,
National Labor Relations Board.

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